

**MINUTES OF
AD HOC COMMITTEE ON RULES OF EVIDENCE**

Friday, May 21, 2010

Arizona Courts Building

1501 W. Washington, Conference Room 109

Web Site: <http://www.azcourts.gov/rules/AdHocCommitteeonRulesofEvidence.aspx>

Members Present:

The Honorable Andrew Hurwitz, Chair
The Honorable Michael Miller
The Honorable Samuel Thumma
Mr. Timothy Eckstein
Mr. Carl Piccarreta
Mr. Milton Hathaway
Ms. Patricia Refo
Mr. Paul Ahler
Prof. Dave Cole

Members Not Present:

None

Staff Present:

Ellen Crowley
Mark Armstrong

Quorum:

Yes

1. Call to Order—Justice Hurwitz

After welcoming committee members, Justice Hurwitz asked committee and staff members to introduce themselves.

2. Approval of Minutes from 4/16/2010 Meeting—Justice Hurwitz

The committee discussed the draft minutes. Justice Hurwitz clarified that the committee's charge is to compare the Arizona and Federal Rules of Evidence, but that committee members may identify other substantive issues that may be appropriate for separate petitions. Justice Hurwitz confirmed that the committee may recommend adoption of the federal rules in whole or in part, or not at all.

Judge Miller moved that the draft minutes be approved. The committee voted unanimously to approve the draft minutes.

3. Firm-up Meeting Schedule—Justice Hurwitz

Justice Hurwitz firmed up the meeting schedule, including topics (all topics are tentative except for those identified for the June meeting) as follows:

June 18, 2010; 9:00 – 2:00 p.m.; Articles V - VI, and unfinished rules from Article IV

August 20, 2010; 9:00 a.m. – 2:00 p.m.; Article VIII or TBD

September 17, 2010; 9:00 a.m. – 2:00 p.m.; Article VII

October 15, 2010; 9:00 a.m. – 2:00 p.m.; Articles IX – XI

November 19, 2010; 9:00 a.m. – 2:00 p.m.; Restyling

December 17, 2010; 9:00 a.m. – 2:00 p.m.; Unfinished Business

The committee agreed that Article VII would not be considered before the September meeting.

4. Unassigned Rules Subcommittee Report—Justice Hurwitz and Judge Armstrong

Judge Armstrong reported that the only rules in Articles I-IV in which there are significant differences between the Arizona and federal rules are Rules 103(a), 103(d), 104(b), 201(g), and 301. After discussion, the committee reached consensus that Rules 103(a) and 201(g) should be amended to be consistent with their federal counterparts, and that Rule 103(d) should not be so amended, for the reasons set forth in the subcommittee report.

The committee agreed to revisit Rule 104(b) at the June meeting. The committee discussed the prospect of amending ARE 104(b) to be consistent with FRE 104(b) with a comment clarifying that the Court intends that the Arizona rule be interpreted consistent with the federal rule and that use of the word “shall” is not intended to be mandatory.¹

¹ This discussion likely was rendered moot by Justice Hurwitz's post-meeting discovery that restyled Rule 104(b) uses “may” instead of “shall,” providing as follows: “When the relevancy of evidence depends on fulfilling a factual condition, the court may admit it on, or subject to, the introduction of evidence sufficient to support a finding that the condition is fulfilled.”

The committee likewise agreed to revisit Rule 301 at the June meeting. A question was posed as to whether references to “statute” in proposed Rule 301, and “applicable statutes” in Rule 402, should be preceded by “Arizona.” In a subsequent discussion, Justice Hurwitz suggested it was most important that we be consistent throughout the rules with respect to such terminology.

5. Rule 404 Subcommittee Report—Judge Thumma, et al.

Judge Thumma reported that the subcommittee recommends no change to Rule 404(c) for the reasons set forth in the subcommittee report. He also stated a preference to adopt a “rape shield” rule.

After discussion, the committee reached consensus that ARE 404(c) should not be amended to be consistent with the comparable federal rules, including FRE 413-415.

Judge Armstrong identified a possible conflict between ARE 404(c)(4) and *State v. Williams*, 209 Ariz. 228, 99 P.3d 43 (App. 2004). The rule states that “sexual offense” is as defined in A.R.S. § 13-1420(C), which does not include all sexual offenses. In *Williams*, the court determined that public sexual indecency with a minor, which is not included in the statutory definition of sexual offense, may be considered a sexual offense for purposes of ARE 404(c). The court stated as follows:

[W]e conclude that the language of Rule 404(c)(4), which states that “the term ‘sexual offense’ is as defined in A.R.S. § 13-1420(C),” does not necessarily preclude a definition more expansive than that provided in A.R.S. § 13-1420. We are unconvinced that, in promulgating Rule 404(c) and referencing A.R.S. § 13-1420(C), our supreme court intended to *narrow* the scope of charged “sexual offenses” for which evidence of other acts may be admitted to show that a defendant has a character trait giving rise to an aberrant sexual propensity to commit the offense charged.

209 Ariz. at 236 ¶ 32, 99 P.3d at 51.

The committee asked the subcommittee to draft a proposed ARE 412 in light of FRE 412 and A.R.S. § 13-1421, Arizona’s rape shield law. The committee also asked the subcommittee to take another look at ARE 404(a) and (b) to determine whether consistency with the federal rule is desirable. These matters will be revisited at the June meeting.

6. Rules 407 and 408 Subcommittee Report—Trish Refo, et al.

Trish Refo reported on the subcommittee’s recommendations. She reported that Arizona case law has interpreted ARE 407 consistent with FRE 407. After discussion, the committee reached consensus that ARE 407 should be amended to be consistent with FRE 407 for the reasons set forth in the subcommittee report.

Trish Refo further reported that the only difference between ARE 408 and FRE 408 is the “criminal” exception in FRE 408(a)(2), which is not included in the Arizona rule. The committee tentatively reached consensus that because ARE 408 was amended eff. January 1, 2010 (R-08-0035), to be consistent with FRE 408, no further changes should be made to the rule. However, Paul Ahler agreed to contact the Attorney General’s office to determine if it has any concerns similar to those raised by the U.S. Justice Dept. that gave rise the criminal exception. Justice Hurwitz agreed to collect the federal materials concerning this rule. Thus, Rule 408 will be revisited at the June meeting.

7. Rule 410 Subcommittee Report—Judge Miller, et al.

At Judge Miller’s request, Justice Hurwitz previously granted the subcommittee additional time to submit its report and deferred consideration of the report until the June meeting. Judge Miller reported on the history of Rule 410 and stated the subcommittee has prepared a draft report that will be finalized and distributed in advance of the June meeting. The committee discussed differences between ARE 410 and FRE 410 without reaching any conclusions.

8. Future Subcommittee Assignments—Justice Hurwitz

Justice Hurwitz led a discussion of Rules 501 and 502. He noted that FRE 502 was adopted in Arizona eff. January 1, 2010 (R-09-0004). These rules, together with Rules 601-605, 607-608 (whether “credibility” means the same thing as “character for truthfulness”), 610, and 612-615, will be unassigned. An Unassigned Rules Subcommittee, consisting of Justice Hurwitz, Judge Armstrong and Trish Refo (Rule 612 only), will report on these rules at the next meeting. With respect to Rule 615, the committee discussed the prospects of adding a new paragraph 5 to the Arizona rule to include “a person otherwise authorized by statute or rule to be present,” consistent with paragraph 4 of the federal rule, or adding paragraph 4 of the federal rule to paragraph 4 of the Arizona rule.

Justice Hurwitz created the following additional subcommittees:

Rule 606 Subcommittee—Justice Hurwitz, Judge Armstrong and Trish Refo (will look at whether Arizona Rules of Criminal Procedure and Arizona criminal case law are consistent with federal rule)

Rule 609 Subcommittee—Prof. Dave Cole, Chair, Paul Ahler and Tim Eckstein

Rule 611 Subcommittee—Carl Piccarreta, Chair, Judge Thumma and Milt Hathaway

Reminder: The Committee previously agreed that subcommittee reports would be distributed to all committee members by Friday of the week prior to the week of the meeting at which the report is to be discussed.

9. Call to the Public—Judge Armstrong

There were no members of the public present and wishing to speak.

10. Next Meeting—Judge Armstrong

The next Committee meeting will be held on June 18, 2010, from 9:00 a.m. – 2:00 p.m., at the Arizona Courts Building, Room 109, 1501 W. Washington, Phoenix, Arizona. The conference call number will be listed on the agenda.

11. Adjournment—Justice Hurwitz

Justice Hurwitz reminded the committee that at the appropriate time, the committee will need to consider the proposed amendment to FRE 804(b)(3), Statement against interest, which has been transmitted to Congress and is expected to take effect December 1, 2010.

Justice Hurwitz thanked the Committee and adjourned the meeting at 1:40 pm.